

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland Avenue
(240) 777-6600

Case No. S-1244

PETITION OF GREGORY J. KENEL AND STEVEN M.KENEL
(d/b/a CREATIVE LANDSCAPES BY GREGORY)

RESOLUTION TO REVOKE SPECIAL EXCEPTION
(Hearings Held September 5, 2001 and September 26, 2001)
(Resolution Adopted September 26, 2001)
(Effective Date of Resolution: December 6, 2001)

EVIDENCE PRESENTED

1. The subject property is all those parcels of land (10.5682 acres) as recorded among the Land Records of Montgomery County, Maryland, in Liber 5721 at Folio 545 and Liber 5753 at Folio 635, located at 15701 Thompson Road, Silver Spring, Maryland in the RE-1 Zone.
2. By Opinion dated February 19, 1986, the Board of Appeals granted Special Exception No. S-1244 to Gregory J. and Steven M. Kenel to permit the operation of a horticultural nursery business, and construction of a building for the business.
3. The submitted Statement of Operations [Exhibit No. 3], referred to in the Board's Opinion granting the special exception, said there would be a maximum of 18 employees during summer, with a decrease in winter to approximately 6 employees. In addition, the Statement of Operations said the equipment in connection with the business would consist of 5 light duty trucks (i.e., 2 one-ton pick-up trucks, 1 three-quarter ton pick-up, and 2 one-half ton pick-ups), a yard tractor equipped with a front-end loader and other farming accessories, rototillers, lawn mowers and various hand and power tools such as shovels, picks, hammers, skill saws, etc.
4. On August 12, 1997, the Kenels received a Notice of Violation (NOV) signed by Susan Scala-Demby, Zoning Investigator, Department of Permitting Services. Ms. Scala-Demby found a violation of the special exception because the Kenels had "...more employees and more trucks than stated in testimony given at [the]

special exception hearing.” The NOV directed the Kenels to either reduce the number of employees and trucks, or to modify the special exception [Exhibit No. 24].

5. By letter dated August 15, 1997, from John R. Barr, Esquire to Susan Scala-Demby, the Kenels advised Ms. Demby that they intended to pursue modification of the special exception, but that they felt they must first address and resolve the non-compliance of the on-site stormwater management facility, which had also been identified by the Department of Permitting Services. [Exhibit No. 20].
5. By a letter dated August 18, 1999, from John R. Barr, Esquire, the Kenels requested that the Board of Appeals administratively modify the special exception to:
 - increase the property area of the special exception;
 - approve a new special exception plan, incorporating a new Stormwater Management Concept Plan and a proposed new parking plan; and
 - remove the limitations in the special exception Opinion, limiting the number of employees and vehicles permitted.

The Board denied the administrative modification request by Resolution dated December 2, 1999.

6. On January 28, 2000, the Kenels filed an application for a modification, with a request for a public hearing, to address the same issues that were the subject of their administrative modification request.
7. The Board received requests to continue the modification hearing from Maryland National Capital Park and Planning Commission (MNCPPC) technical staff on April 12, 2001 and May 1, 2000 [Exhibit Nos. 14 and 16]; and from John R. Barr, Esquire, on September 18, 2000, January 10, 2001, and April 19, 2001 [Exhibit Nos. 18, 23, 26].
8. By Memorandum dated April 25, 2001, the Board requested that the Department of Permitting Services inspect the special exception use. By Memorandum dated April 30, 2001, Stanley N. Garber, Zoning Investigator reported on his inspection of Case No. S-1244, including changes undertaken to comply with the requirements of the special exception opinion and the Paint Branch Special Protection Area. In addition, Mr. Garber's memo notes that the special exception employs 60 people and has 17 trucks, in excess of the terms and conditions of the opinion granting the use. [Exhibit No. 47].
9. On July 10, 2001 the Board received a letter from John R. Barr, Esquire, asking the Board to dismiss the pending modification request.

10. On September 5, 2001, the Board of Appeals convened a Show Cause hearing on special exception S-1244, which was continued to September 26, 2001. At the Show Cause hearing, the Kenels requested permission to continue to operate the special exception for a horticultural nursery, in compliance with the terms and conditions in the Board's Opinion of February 19, 1986. They also proposed to adopt the recommendations of the Transportation Planning Staff of the Maryland National Capital Park and Planning Commission regarding limiting the traffic impacts of the use [Exhibit No. 26].
11. At the hearing, in response to Board questions, Steve Kenel testified that the number of employees and the number of trucks rose close to their current levels "Right around '93, '94..." [Transcript, September 26, 2001 p. 39-40].

FINDINGS OF THE BOARD

1. The Board finds that the special exception has been out of compliance with the original terms and conditions of the Board's 1986 Opinion since 1993.
2. The Board finds that the increase from the 18 employees permitted in the special exception opinion to the current level of 60, and from the 5 trucks permitted in the opinion to 17 trucks, has had an adverse impact on the surrounding neighborhood. [Exhibit Nos. 51 and 54].
3. The Board notes that, despite the Kenels' considerable efforts to address the requirements of the Special Protection Area, that they did make a good faith effort to reduce the number of employees, or trucks or the attendant traffic impacts on the neighborhood, prior to the Show Cause Hearing.
4. The Board finds, therefore, pursuant to Section 59-G-1.3(e)(6) of the Zoning Ordinance, that based upon the longstanding failure of the special exception holders to comply with the terms and conditions of the original special exception, and upon the adverse impacts of that non-compliance on the surrounding neighborhood, that the special exception should be revoked. Therefore;

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that Special Exception Number S-1244, granted February 19, 1986, to Gregory J. and Steven M. Kenel to permit the operation of a horticultural nursery business, and construction of a building for the business, is hereby **REVOKED**.

On a motion by Louise L. Mayer, seconded by Allison I. Fultz, with Donna L. Barron and Donald H. Spence, Jr., Chairman in agreement, and Angelo M. Caputo opposed, the Board adopted the foregoing Resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 6th day of December, 2001.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

